



**ENTERED
06/26/2014**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE)
)
)
HOT-HED, INC.,) CASE NO. 11-35208-H3-7
)
Debtor,)
)

MEMORANDUM OPINION

Following an evidentiary hearing on the "Joint Emergency Motion for In Camera Review of Allegedly Privileged Documents," (Docket No. 195) filed by William G. West, Trustee, and SafeHouse Habitats (Scotland), Ltd. ("SafeHouse"), the court has conducted a review, in camera, of seven audio recordings and two emails designated by the parties, pursuant to the "Agreed Order Regarding Emergency Motion to Quash 2004 Subpoenas and for Protection and Objection to the Trustee's 2004 Subpoena" (Docket No. 176). The following are the Findings of Fact and Conclusions of Law of the court. A separate conforming Judgment will be entered. To the extent any of the Findings of Fact are considered Conclusions of Law, they are adopted as such. To the extent any of the Conclusions of Law are considered Findings of Fact, they are adopted as such.

Findings of Fact

Hot-Hed, Inc. ("Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code on June 16, 2011. William

G. West ("Trustee") is the Chapter 7 Trustee.

Trustee filed Adv. No. 13-3107 against Louis Jasper Wardlaw Posey ("Wardlaw"), Hot-Hed International, S.A. ("HHI"), Cinaruco International, S.A. ("Cinaruco"), WAHA, S.A. ("WAHA"), Hot-Hed International S.A. Egypt, PT Hot-Hed Indonesia, Hot-Hed International Libya S.A., Hot-Hed Nigeria Ltd., Rawabi Hot-Hed Co. Ltd., and HH SA, asserting generally that a) Wardlaw structured the business such that Debtor's profits were diverted to HHI; b) Wardlaw diverted the proceeds of the suit against BMP first from Debtor to Cinaruco, and then on to WAHA; c) various affiliates are holding Debtor's inventory without having paid Debtor for it; d) Wardlaw should be individually liable for any amount due for any defendants on an alter ego theory.

Trustee and SafeHouse Habitats (Scotland), Ltd. ("SafeHouse") noticed the Bankruptcy Rule 2004 examinations of Karyn Andersen, who previously worked for Samer Al-Azem ("Al-Azem") as a paralegal, and her husband, Bo Andersen. Wardlaw, HHI, and WAHA filed a motion to quash the notices of Bankruptcy Rule 2004 examination. (Docket No. 163, supplemented at Docket No. 167). Al-Azem filed an objection to the notices of Bankruptcy Rule 2004 examination. (Docket No. 164). Al-Azem testified that he has been counsel for Wardlaw, Hot Hed Oil Tool Del Norte, S.A. de C.V., Hot Hed International Ltd., Lance Patillo, and Hot Hed International Ltd. Bahamas. He testified

that he is presently counsel for HHI, PT Hot Hed Indonesia, WAHA, and Wardlaw.

The motion to quash filed by Wardlaw, HHI, and WAHA was set for an evidentiary hearing. At the hearing, Trustee, SafeHouse, HHI, WAHA, Wardlaw, the Andersens, and Al-Azem presented a proposed Agreed Order. The court entered the Agreed Order on December 3, 2013. (Docket No. 176).

The Agreed Order provided in part that the Andersens were to produce all documents responsive to the notices of Bankruptcy Rule 2004 examination to W. Steven Bryant, counsel for Al-Azem and Samer Al-Azem P.C. d/b/a The Azem Firm. Bryant was to review the documents "for the sole purpose of determining which of the Documents may be subject to the attorney-client privilege, work-product or other privilege, or constitute confidential or proprietary information" of any client of Al-Azem or the Azem Law Firm. Bryant was to turn over to Trustee all documents not identified as privileged.¹ As to those documents Bryant identified as privileged, Bryant was to provide a privilege log identifying, for each disputed document, its length, date, brief description, author and recipients, name of the party asserting privilege, and basis for the claim of

¹The Agreed Order also calls for a further review by Trustee. There is a separate dispute regarding Trustee's review and turnover of documents to SafeHouse. That dispute is not addressed in this Memorandum Opinion.

privilege. Any disputes regarding challenges to documents asserted by Al-Azem to be privileged were to be presented to the court for review in camera. (Docket No. 176). Trustee and SafeHouse timely filed a motion for such review in camera. (Docket No. 195).

The court held an evidentiary hearing on the motion for review in camera. At the hearing, Al-Azem testified regarding each of the disputed documents. The parties have reduced the number of disputed documents to nine. They consist of seven audio recordings and two emails. At the conclusion of the hearing, the court determined to review the documents in camera, with respect to Al-Azem's assertions of privilege.²

W. Steven Bryant, the counsel for Samer Al-Azem ("Al-Azem") and Samer Al-Azem P.C. d/b/a The Azem Firm, presented the audio recordings and emails to the court as exhibits at the hearing on the motion for review in camera.

Al-Azem testified that all of the disputed documents come from Al-Azem's servers. He testified that he recorded the conversations as a substitute for taking notes on his conversations with Wardlaw and Lance Patillo. He testified that, in the conversations, he was providing legal advice to the other

²Al-Azem's amended privilege log asserts attorney-client privilege as to each of the remaining documents. The amended privilege log does not assert work product privilege as to any of the remaining documents. (Trustee's Exhibit 3).

persons on the recording.

Al-Azem Exhibit I

Al-Azem Exhibit I is an audio recording, 34:20 in length.³ Al-Azem's amended privilege log asserts privilege on behalf of Louis Wardlaw, HH Oil Tools, and Hot Hed Int'l Ltd.⁴ Al-Azem's description of the audio recording states that it is a conversation between Al-Azem and Wardlaw on May 2, 2011: "Re: various business matters concerning HH Oil Tools and Hot-Hed Int'l Ltd. and how the bankruptcy filing of Hot-Hed, Inc. would affect those entities' interests." (Trustee's Exhibit 3).

Al-Azem testified that, in the conversation at Al-Azem Exhibit I, he was acting as the attorney for Hot Hed Oil Tools and Hot Hed International Ltd. He testified that the conversations concerned facts communicated to him by Wardlaw and Patillo because they wanted legal advice. He testified that no one besides Al-Azem, Wardlaw, and Patillo participated in the conversations. He testified that no one else was authorized to listen to them, but he assumes Karyn Andersen did. He testified

³In this opinion, the times identified are in minutes and seconds. Thus, for example, where the court has identified below a segment running from the beginning through "3:01," that segment of the audio recording ends three minutes and one second after the beginning of the audio segment.

⁴The entities as to which Al-Azem asserts privilege on behalf of his current or former clients are not identified precisely. He testified he did not have engagement letters with these entities.

that Wardlaw and Patillo did not communicate facts to him in order to commit a crime, or tort. He testified that Wardlaw and Patillo want him to keep the contents of those conversations confidential. He testified that Hot Hed International Ltd. and HH Oil Tools want him to keep the contents of the conversations confidential. He testified that Wardlaw, Patillo, Hot Hed International Ltd. and HH Oil Tools have not waived the privilege. Al-Azem's testimony was conclusory in nature, and did not address any background facts.

The court has reviewed Al-Azem Exhibit I. The discussion between Al-Azem and Wardlaw in Al-Azem Exhibit I includes eight topics. As to the first topic of conversation, which runs from the beginning through 3:01, the communication appears to be for the purpose of securing legal advice, but not as to any of the parties on whose behalf Al-Azem asserts privilege. As to the second topic of conversation, which runs from 3:02 through 6:23, the communication does not appear to be for the purpose of securing a legal opinion. As to the third topic of conversation, which runs from 6:24 through 14:26, the communication appears to be for the purpose of obtaining legal advice and also contains Al-Azem's legal advice to one or more of the entities asserting privilege. As to the fourth topic of conversation, which runs from 14:27 through 16:29, the communication does not appear to be for the primary purpose of

securing legal advice. As to the fifth topic of conversation, which runs from 16:30 through 22:57, the communication does not appear to be either the provision of legal advice or for the purpose of obtaining legal advice. As to the sixth topic of conversation, which runs from 22:58 through 23:56, the communication does not appear to be either the provision of legal advice or for the purpose of obtaining legal advice as to any of the entities on whose behalf Al-Azem asserts privilege. As to the seventh topic of conversation, which runs from 23:57 through 26:51, the communication appears to be for the purpose of securing legal advice. As to the eighth topic of conversation, running from 26:52 through the conclusion, the communication appears to include the provision of legal advice.

Al-Azem Exhibit J

Al-Azem Exhibit J is an audio recording, 36:08 in length. Al-Azem's amended privilege log asserts privilege on behalf of Patillo. Al-Azem's description of the audio recording states that it is a conversation between Al-Azem and Patillo on May 9, 2011: "Re: the organization of a Delaware entity to act as an affiliate of Hot-Hed Int'l Ltd. and the general impact of bankruptcy law on such matters." (Trustee's Exhibit 3).

Al-Azem testified that, in the conversation at Al-Azem Exhibit J, he was acting as the attorney for Patillo. He testified that he began representing Patillo at the time Hot Hed

Oil Tools was being formed in 2011. He testified that the conversations were regarding Wardlaw's and Patillo's personal affairs, because of SafeHouse's prior actions attempting to pierce the corporate veil. He testified that the communication at Al-Azem Exhibit J was regarding the general impact of bankruptcy, because he was negotiating with SafeHouse and Alford Safety Systems, Inc. for a global settlement to avoid having to file bankruptcy.

The court has reviewed Al-Azem Exhibit J. The discussion between Al-Azem and Patillo in Al-Azem Exhibit J includes five topics of conversation. As to the first topic of conversation, which runs from the beginning through 16:41, the communication does not appear to be for the provision of legal advice or the securing of legal advice. As to the second topic of conversation, which runs from 16:42 through 18:45, the communication does not appear to be for the provision of legal advice to Patillo. As to the third topic of conversation, which runs from 18:46 through 20:36, the communication does not appear to be for the provision of legal advice or the securing of legal advice. As to the fourth topic of conversation, which runs from 20:37 through 25:55, the communication does not appear to be for the securing of legal advice or the provision of legal advice to Patillo. As to the fifth topic of conversation, which runs from 25:56 through the conclusion, the communication does not appear

to be for the securing of legal advice or the provision of legal advice to Patillo.

Al-Azem Exhibit K

Al-Azem Exhibit K is an audio recording, 31:54 in length. Al-Azem's amended privilege log asserts privilege on behalf of Wardlaw. Al-Azem's description of the audio recording states that it is a conversation between Al-Azem and Wardlaw on May 13, 2011: "Re: infringement of individual patents and impact of bankruptcy law on patent infringement." (Trustee's Exhibit 3).

Al-Azem testified that the communication at Al-Azem Exhibit K was regarding the general impact of bankruptcy, because he was negotiating with SafeHouse and Alford Safety Systems, Inc. for a global settlement to avoid having to file bankruptcy.

The court has reviewed Al-Azem Exhibit K. The discussion between Al-Azem and Wardlaw in Al-Azem Exhibit K includes six topics of conversation. As to the first topic of conversation, which runs from the beginning through 8:03, the communication does not appear to be for the securing of legal advice or provision of legal advice to Wardlaw. As to the second topic of conversation, which runs from 8:04 through 13:58, the communication does not appear to be for the securing of, or the the provision of, legal advice to Wardlaw. As to the third topic of conversation, which runs from 13:59 through 15:38, it is not clear that the communication is for the securing of, or the

provision of, legal advice to Wardlaw. As to the fourth topic of conversation, which runs from 15:39 through 16:43, the communication does not appear to be for the securing of legal advice. As to the fifth topic of conversation, which runs from 16:44 through 22:05, the communication does not appear to be for the provision of legal advice. As to the sixth topic of conversation which runs from 22:06 through the conclusion, the communication does not appear to be for the securing of, or the provision of, legal advice to Wardlaw.

Al-Azem Exhibit L

Al-Azem Exhibit L is an audio recording, 12:16 in length. Al-Azem's amended privilege log asserts privilege on behalf of Wardlaw. Al-Azem's description of the audio recording states that it is a conversation between Al-Azem and Wardlaw on June 14, 2011: "Re: foreign patent matters, homestead laws, and individual bankruptcy-law advice" (Trustee's Exhibit 3).

Al-Azem testified that the communication at Al-Azem Exhibit L concerned individual bankruptcy advice to Wardlaw.

The court has reviewed Al-Azem Exhibit L. The discussion between Al-Azem and Wardlaw in Al-Azem Exhibit L includes three topics of conversation. As to the first topic of conversation, which runs from the beginning through 3:08, the communication does not appear to be for the purpose of securing, or the provision of, legal advice to Wardlaw. As to the second

topic of conversation, which runs from 3:09 through 6:45, it is not clear that the communication is for the purpose of securing, or the provision of, legal advice to Wardlaw. As to the third topic of conversation, which runs from 6:46 through the conclusion, the communication appears to be for the purpose of the provision of legal advice to Wardlaw, individually.

Al-Azem Exhibit M

Al-Azem Exhibit M is an audio recording, 13:02 in length. Al-Azem's amended privilege log asserts privilege on behalf of Wardlaw. Al-Azem's description of the audio recording states that it is a conversation between Al-Azem and Wardlaw on June 17, 2011: "Re: legal advice concerning a Delaware entity and the effects of filing a suggestion of bankruptcy" (Trustee's Exhibit 3).

Al-Azem testified that the conversation at Al-Azem Exhibit M concerned Hot Hed Oil Tools. He testified that he relayed to Wardlaw what he had learned from Debtor's bankruptcy attorney, as to how Debtor's bankruptcy would affect Wardlaw, personally.

The court has reviewed Al-Azem Exhibit M. The discussion between Al-Azem and Wardlaw in Al-Azem Exhibit M includes four topics of conversation. As to the first topic of conversation, which runs from the beginning through 3:01, it is not clear that the communication is for the purpose of securing,

or the provision of, legal advice to Wardlaw. As to the second topic of conversation, which runs from 3:02 through 9:32, the communication appears to be for the purpose of providing legal advice to Wardlaw, individually. As to the third topic of conversation, which runs from 9:33 through 10:54, it is not clear that the communication is for the provision of legal advice to Wardlaw. As to the fourth topic of conversation, which runs from 10:55 through the conclusion, the communication does not appear to be for the purpose of securing, or the provision of, legal advice to Wardlaw.

Al-Azem Exhibit N

Al-Azem Exhibit N is an audio recording, 26:38 in length. Al-Azem's amended privilege log asserts privilege on behalf of Wardlaw. Al-Azem's description of the audio recording states that it is a conversation between Al-Azem and Wardlaw on May 19, 2011: "Re: Hot Hed Int'l Ltd. and its affiliates, patent infringement, alter-ego theories and the effects of a bankruptcy filing on such matters" (Trustee's Exhibit 3).

The court has reviewed Al-Azem Exhibit N. The discussion between Al-Azem and Wardlaw in Al-Azem Exhibit N includes seven topics of conversation. As to the first topic of conversation, which runs from the beginning through 2:38, the communication appears to be for the purpose of securing, and the provision of, legal advice to Wardlaw. As to the second topic of

conversation, which runs from 2:39 through 6:24, the communication appears to be for the purpose of securing, and the provision of, legal advice to Wardlaw. As to the third topic of conversation, which runs from 6:25 through 10:21, the communication does not appear to be for the securing of, or the provision of, legal advice to Wardlaw, individually. As to the fourth topic of conversation, which runs from 10:22 through 13:07, the communication appears to be for the purpose of provision of legal advice to Wardlaw, individually. As to the fifth topic of conversation, which runs from 13:08 through 17:46, it is not clear that the communication is for the purpose of securing, or the provision of, legal services to Wardlaw, individually. As to the sixth topic of conversation, which runs from 17:47 through 19:28, the communication appears to be for the purpose of providing legal advice to Wardlaw, individually. As to the seventh topic of conversation, which runs from 19:29 through the conclusion, the communication does not appear to be for the purpose of securing, or the provision of, legal advice to Wardlaw, individually.

Al-Azem Exhibit O

Al-Azem Exhibit O is an audio recording, 11:21 in length. Al-Azem's amended privilege log asserts privilege on behalf of Wardlaw. Al-Azem's description of the audio recording states that it is a conversation between Al-Azem and Wardlaw on

June 20, 2011: "Re: the dissolution of a Delaware entity and effect of bankruptcy filings" (Trustee's Exhibit 3).

The court has reviewed Al-Azem Exhibit O. The discussion between Al-Azem and Wardlaw in Al-Azem Exhibit O includes five topics of conversation. As to the first topic of conversation, which runs from the beginning through 3:50, the communication appears to be for the purpose of securing legal advice for Wardlaw, individually. As to the second topic of conversation, which runs from 3:51 through 4:58, the communication does not appear to be for the provision of legal advice. As to the third topic of conversation, which runs from 4:59 through 6:19, the communication appears to be for the provision of legal advice to Wardlaw. As to the fourth topic of conversation, which runs from 6:20 through 9:19, the communication does not appear to be for the purpose of securing, or the provision of, legal advice to Wardlaw, individually. As to the fifth topic of conversation, which runs from 9:20 through the conclusion, it is not clear that the communication is for the purpose of securing, or the provision of, legal advice to Wardlaw.

Al-Azem Exhibit P

Al-Azem Exhibit P is an email, dated June 10, 2011, from Al-Azem to Juan A. Tejada Mora ("Tejada") and Wardlaw, with copies to Al-Azem, Patillo, and Rosalin Rigueros. Al-Azem's

amended privilege log asserts privilege on behalf of Hot Hed International Ltd. Bahamas. (Trustee's Exhibit 3).

Al-Azem's amended privilege log describes "E-mail regarding Hot Hed Int'l Ltd. Bahamas' resolutions changing the composition of the Debtor's Board of Directors."

Al-Azem testified that Tejada is an attorney in Panama who set up Hot Hed International Ltd. Bahamas. He testified that Rosalin Rigueros is Tejada's assistant. He testified that the email concerned facts communicated to Al-Azem and Tejada by Hot Hed Bahamas' directors because they wanted legal advice from Al-Azem and Tejada. Al-Azem testified that no one other than Al-Azem, Hot Hed Bahamas personnel, Tejada and Rigueros and Wardlaw received the email. He testified that the facts were not communicated in order to commit a crime or tort. He testified that Hot Hed Bahamas wanted him to keep the email confidential. He testified, in conclusory fashion, that no one at Hot Hed Bahamas waived the privilege. Al-Azem testified that he does not know whether Patillo was an officer or director of Hot Hed International Ltd. Bahamas.

The court has reviewed Al-Azem Exhibit P. The email appears to include communication for the purpose of providing legal advice to Hot Hed International Ltd. Bahamas.

Al-Azem Exhibit Q

Al-Azem Exhibit Q is an email, dated May 27, 2011, from Al-Azem to Wardlaw and Patillo, with a copy to Karyn Andersen. Al-Azem's amended privilege log asserts privilege on behalf of Wardlaw. (Trustee's Exhibit 3).

Al-Azem's amended privilege log describes "E-mail to Louis Wardlaw and Lance Patillo providing individual legal advice regarding their potential, personal liability in the face of a possible employment-litigation claim against Hot Hed, Inc."

Al-Azem testified that he sent the email at Al-Azem Exhibit Q to Patillo and Wardlaw, because he had received an email from Juan Tang, an accountant for Debtor. He testified that the email from Tang appeared to be copied to someone who he believed to be an employment law attorney trying to support a claim for constructive discharge. He testified that he wrote to Wardlaw and Patillo to provide legal advice on the perceived suit to be brought against them.

The court has reviewed Al-Azem Exhibit Q. The email appears to include communication for the purpose of providing legal advice to Wardlaw.

Conclusions of Law

Privilege

Federal common law controls privileges asserted in the context of a Bankruptcy Rule 2004 examination. In re Royce

Homes, L.P., 449 B.R. 708 (Bankr. S.D. Tex. 2011), citing In re Asia Global Crossing, Ltd., 322 B.R. 247 (Bankr. S.D.N.Y. 2005).

The party invoking the privilege bears the burden of proving that his or her communications are privileged and, therefore, protected from disclosure. In re Santa Fe Int'l Corp., 272 F.3d 705 (5th Cir. 2001). The party invoking the privilege must prove each element of the definition of attorney-client privileged communications, including confidentiality and absence of waiver. Royce Homes, 499 B.R., at 725.

The attorney-client privilege guards confidential communications made by a client to his attorney from disclosure. United States v. Neal, 27 F.3d 1035 (5th Cir. 1994). It serves to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege is premised on the attorney's need to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

The Fifth Circuit has defined attorney-client privileged communications as: 1) confidential communications; 2) made to a lawyer or his subordinate; 3) for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding. United States v. Robinson,

121 F.3d 971 (5th Cir. 1997); United States v. Pipkins, 528 F.2d 559 (5th Cir.1976).

Not all communications between a client and his or her attorney are protected by the attorney-client privilege. Pipkins, 528 F.2d, at 562-63. While the attorney-client privilege extends to all situations in which counsel is sought on a legal matter, it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege. Navigant Consulting, Inc. v. Wilkinson, 220 F.R.D. 467 (N.D. Tex. 2004), citing Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)).

In the instant case, as addressed above, the communications in the third, seventh, and eighth topics of conversation in Al-Azem Exhibit I; the third topic of conversation in Al-Azem Exhibit L; the second topic of conversation in Al-Azem Exhibit M; the first, second, fourth, and sixth topics of conversation in Al-Azem Exhibit N; the first and third topics of conversation in Al-Azem Exhibit O; and Al-Azem Exhibits P and Q were all for the securing of, or the provision of, legal advice to the persons identified on Al-Azem's privilege log. The court concludes that Al-Azem's claim of privilege applies to those portions. With respect to the other portions the claimants asserting privilege have not met their burden of proof.

Waiver

Whether the claimant has waived the privilege is a fact-specific inquiry. Alpert v. Riley, 267 F.R.D. 202 (S.D. Tex. 2010). A party can waive the attorney-client privilege by voluntarily disclosing privileged communications or by inadvertently disclosing those communications to third parties. Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993).

In the instant case, Al-Azem asserted a claim of privilege as to the email at Al-Azem Exhibit P on behalf of Hot Hed International Ltd. Bahamas. The email was copied to Patillo, as to whom Al-Azem testified he does not know of an association with Hot Hed International Ltd. Bahamas. The court concludes that the privilege has been waived as to the email at Al-Azem Exhibit P.

With respect to email at Al-Azem Exhibit Q, Al-Azem asserted a claim of privilege on behalf of Wardlaw. The email was copied to Patillo.

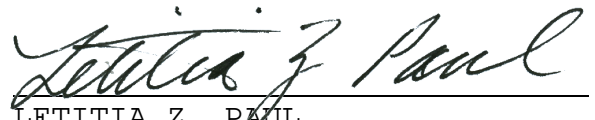
The court notes that Al-Azem has asserted a joint privilege. There is an exception to the general rule that disclosure waives the privilege. Two types of communication are protected under the "common litigation interest" privilege: (1) communications between co-defendants in actual litigation and their counsel and (2) communications between potential co-defendants and their counsel. With respect to the latter

category, the term "potential" has not been clearly defined. However, because the privilege is "an obstacle to truthseeking," it must "be construed narrowly to effectuate necessary consultation between legal advisers and clients." There must be a palpable threat of litigation at the time of the communication, rather than a mere awareness that one's questionable conduct might some day result in litigation. In re Santa Fe Intern. Corp., 272 F.3d 705 (5th Cir. 2001).

In the instant case, the communication at Al-Azem Exhibit Q addressed solely Wardlaw's personal liability. There is nothing in it to connect it to Patillo, except Al-Azem's directive to Patillo to implement Al-Azem's recommendation to Wardlaw. The court concludes that the privilege has been waived as to the email at Al-Azem Exhibit Q.

Based on the foregoing, a separate conforming Judgment will be entered.

Signed at Houston, Texas on June 26, 2014.


LETITIA Z. PAUL
UNITED STATES BANKRUPTCY JUDGE